

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2003B005**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**RANDY SANTISTEVAN,**

Complainant,

vs.

**DEPARTMENT OF TRANSPORTATION,**

Respondent.

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Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on August 26, September 25 and October 9, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Danielle Moore represented Respondent. Respondent's advisory witness was Robert Torres, the appointing authority. Complainant appeared and was represented by Mark Schwane.

**MATTER APPEALED**

Complainant, Randy Santistevan ("Complainant" or "Santistevan") appeals his termination by Respondent, Colorado Department of Transportation ("Respondent" or "CDOT"). Complainant seeks reinstatement and back pay.

For the reasons set forth below, Respondent's action is **affirmed.**

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

**FINDINGS OF FACT**

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## **General Background**

1. Complainant worked as a Transportation Maintenance Worker 1 (“TM1”) for CDOT, Region 2, from March 2, 1992 until July 9, 2002.
2. TM1s are entry level maintenance workers who frequently must work alone and whose duties include, among other things, maintenance of highways, operation of equipment, snow removal, inspection and upkeep of equipment and emergency response (downed signage, dead animals, weather conditions, etc.).
3. A minimum job requirement for TM1s is that they are available twenty-four hours a day, seven days a week to respond to weather and signage emergencies. As part of this availability requirement, TM1s are to provide a telephone number at which they may be reached at all times.
4. In Region 2, TM1s split up into patrols of anywhere from 2 to 10 people. Transportation Maintenance Worker 2s (“TM2”) operate as the work leaders for each patrol. Transportation Maintenance Worker 3s (“TM3”) coordinates the work between patrols and does the merit ratings for the TM1s and TM2s on those patrols.
5. Region 2 covers close to 2000 miles of roadway which must be maintained by the various patrols. Each patrol is assigned to a section of roadway and is primarily responsible for maintaining that roadway. It is often necessary for TM1s, given the amount of roadway to be maintained, to work independently, without direct supervision.
6. TM1s receive safety, equipment and general training from their supervisors on a monthly basis and, on an annual basis, at CDOT’s training facility in Golden. In addition, there is a manual available to all TM1s that outlines safety procedures for equipment operation. Finally, whenever there are special projects, TM1s typically receive training prior to working on those projects.
7. One of the pieces of heavy equipment that TM1s operate is a snowplow consisting of a truck to which a mold board is attached. A mold board is a huge curved portion of metal attached to the front of a truck. Attached by bolts to the mold board, on the lower edge, are removable blades that are in direct contact with the road surface. When the blades become worn down they should be replaced with new blades. If the blades are not replaced, the mold board will be damaged. Repair and/or replacement of a mold board is more expensive than replacement of the blades.
8. From the 1992/1993 rating period through the 1998/1999 rating period, Complainant received “fully competent” or “good” ratings. Many of those ratings were within the lower range of those ratings and included areas in which Complainant received “needs improvement” ratings.

### **1999/2000 Performance Rating Period**

9. On September 23, 1999, during a meeting with Ken Wissel (a supervisor) and Alan Passarelli (a TM2 lead worker) to discuss an earlier altercation between Complainant and Passarelli, Complainant referred to a fatal shooting by a CDOT employee in a Greeley CDOT office. Ken Wissel and Passarelli perceived the statements as veiled or direct threats against them.
10. Because of his comments, Complainant was placed on administrative leave and the incident was investigated.
11. On December 13, 1999, Robert Torres, the Regional Transportation Director for Region 2, issued a corrective action against Complainant regarding the September 1999 incident, stating that Complainant had violated CDOT's workplace violence policy and providing him with a course of action for improvement. In addition, Complainant was transferred to a new workstation and received counseling.
12. Complainant received a "fully competent" rating for the 1999/2000 rating period.

### **2000/2001 Performance Rating Period**

13. For a seventeen-month period during 2000 and 2001, Complainant's TM2 work leader was injured and out on leave. Therefore, Complainant did not have a TM2 work leader permanently assigned to his patrol. Instead, TM2 work leaders from other patrols were temporarily assigned to the Complainant's patrol, incorporating oversight of Complainant's patrol into their everyday duties.
14. On November 11, 2000, Complainant was not available by telephone to respond to an emergency, a widespread snowstorm. Because Complainant's TM2 work leader was injured, only Complainant and one other TM1 were working on Complainant's patrol at the time of the emergency. Because Complainant was unavailable, other patrols' workers were called to come in and assist with the emergency. In addition, Complainant's fellow TM1 co-worker on his patrol worked extra hours.
15. The following week, Complainant explained to Gerald Watson, the Maintenance Superintendent for Region 2, that he (Complainant) had been out of town at the time of the storm and, also, that he was having financial problems and, therefore, did not have a phone. Watson issued him a corrective action on November 16, 2000.
16. On January 28, 2001, Complainant caused \$600 of damage to the mold board on a snowplow because the blades were not replaced when they wore down.
17. On February 2, 2001, Watson issued Complainant a corrective action regarding the January 2001 mold board incident. Complainant did not appeal the corrective action.

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18. On March 16, 2001, during a maintenance operation, while using an air compressor, Complainant blew rocks or sand onto a privately owned vehicle. Watson, who was driving through the area at the time, also had debris blown onto his vehicle. Prior to going out on the maintenance operation, Complainant and the rest of the crew were instructed to blow debris away from vehicles.
19. On April 12, 2001, a corrective action was issued against Complainant for the debris-blowing incident. Complainant appealed the corrective action, but Torres ultimately upheld it.
20. In April 2001, Complainant checked out a state vehicle on a Friday in order to attend the Training Academy in Golden. He was not told that he had to return the vehicle by a certain time. When he left the Academy the following Friday, he spent the weekend in Denver, not returning the vehicle until Sunday. He did not call in his location, nor was he available when his supervisor tried to contact him.
21. On April 16, 2001, Watson issued Complainant a corrective action for failing to return the vehicle on time and for being unavailable.
22. Complainant received a "needs improvement" rating for 2000/2001. He disagreed with the rating. When he spoke to Carl Valdez, his TM3 supervisor, he acknowledged that he was having work performance problems and explained that he was having personal problems because of his divorce.
23. Ultimately, Torres upheld the rating because of the four corrective actions arising out of Complainant's failure to respond to emergency calls, the cracked mold board, the debris on the highway incident, and Complainant's failure to return the state vehicle.
24. For a time after receiving his 2000/2001 rating, Complainant met weekly with Valdez to discuss any problems Complainant might be having. These meetings helped Complainant understand what was expected of him. Eventually, Complainant and Valdez decided that they no longer needed to hold these meetings.

#### **2001/2002 Performance Rating Period**

25. On July 31, 2001, Complainant was involved in a severe traffic accident with a privately owned semi-truck when he drove a CDOT tractor mower under a bridge with the wings on the mower attachment in a lowered position. The proper signage, warning the public of the mowing operation, was in place.
26. The tractor mower that Complainant was driving ended up on its end, turned 180 degrees from the direction in which it had originally been traveling and three-quarters of the way into the driving lane; the semi-truck was flipped onto its side.
27. The tractor mower was totaled. The cost of replacing it was over \$50,000. The Colorado

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State Patrol issued, and Complainant pled guilty to, a citation for careless driving.

28. On August 23, 2001, based upon the citation and the report of the Colorado State Patrol, Complainant was issued a corrective action by Watson. Complainant did not appeal the corrective action.
29. In January 2002, Cary Mount was permanently assigned as the TM2 work leader for Complainant's patrol.
30. During the 2001/2002 rating period, Complainant was involved in eight incidences of poor performance for which no corrective or disciplinary actions were issued but which were documented in his performance evaluation. These incidences included:
  - On July 16, 2001, Complainant gouged 100 feet of road surface when he left his truck's brake on, resulting in the reapplication of surface materials.
  - On September 4, 2001, Complainant's truck prematurely dumped overlay materials because Complainant failed to apply the brake before exiting the vehicle.
  - On January 24, 2002, Mount asked Complainant to replace the blades on a mold board. Complainant took off the blades but left work without putting on new blades.
  - On February 27, 2002, when he had been sent to mow weeds, Complainant used a bi-directional tractor (a "one-armed bandit") to cut down a tree without utilizing proper signage or traffic control. Such tractors are fitted with one-arm mowers that can reach over or around obstacles that can't be reached with regular mowers. They are only to be used for mowing.
  - One day later, on February 28, 2002, Complainant used a cat loader to knock down a tree that was four feet around and thirty feet tall. He did not utilize the proper signage or traffic control and there were branches in the highway. Cat loaders are only for moving piles of debris or loading trucks.
  - On March 19, March 24 and April 17, 2002, Cary Mount was unable to get a hold of Complainant to deal with emergency situations, because Complainant did not have a phone.
31. Based upon past history, various co-workers supervisors for Complainant, including Gerald Watson, Ken Wissel and Cary Mount, think Complainant is neither a reliable nor safe employee.

#### **R-6-10 Meeting and Disciplinary Action**

32. In April 2002, Torres got an e-mail from Wissel that Complainant had received a "needs improvement" rating for the second year in a row. Torres reviewed Complainant's 2001/2002 performance evaluation and, because of the number of incidents involving misuse of equipment and unavailability, decided to have an R-6-10 meeting.
33. The R-6-10 meeting was scheduled for June 10, 2002. When Complainant did not show up for the meeting, Torres tried to locate him. Complainant said that he had forgotten about the R-

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6-10 meeting. The meeting was rescheduled for June 14, 2002.

34. At the June 14, 2002 R-6-10 meeting, Complainant repeatedly stated that he did not know what to do to improve his performance and disclosed that he was under stress due to some personal problems, both emotional and financial. When Torres told him that he needed to separate those problems from work, Complainant stated that he did not think that he could do that.
35. Prior to imposing discipline Torres spoke to some of Complainant's co-workers regarding their concerns about working with Complainant. He also spoke to Complainant's supervisors to review some of the instances of poor performance. Finally, Torres reviewed Complainant's file.
36. Prior to imposing discipline Torres considered Complainant's prior performance evaluations, the issues of safety to the traveling public and Complainant's co-workers, Complainant's lack of availability and, finally, the cost in dollars and stress on Complainant's co-workers to handle his mishaps.
37. Complainant was terminated from his employment on July 9, 2002.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

### **A. Burden of Proof**

In this *de novo* disciplinary proceeding, the Respondent has the burden to prove by preponderant evidence that the acts or omissions on which the termination was based occurred and that just cause warranted the termination. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of*

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*Social Services*, 919 P.2d 942 (Colo. App. 1996).

## **II. HEARING ISSUES**

### **A. Complainant committed the acts for which he was disciplined.**

Complainant was terminated for receiving two “needs improvement” ratings for two consecutive years. The undisputed evidence, corroborated by both Respondent’s witnesses and Complainant himself, is that Complainant did engage in many of the incidences which resulted in the the “needs improvement” ratings indicated in his performance evaluations. Complainant proffered reasons for why he behaved as he did. He cites to divorce and the stress, both personal and financial, which he suffered as a result. However, while those reasons elicit empathy, they do not refute the overwhelming evidence presented by Respondent that Complainant’s performance at work was inadequate. The basis for Complainant’s poor performance goes to the discipline imposed.

### **B. The Appointing Authority’s action was not arbitrary, capricious, or contrary to rule or law.**

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

There was no credible evidence that Torres, as the appointing authority, in reviewing Complainant’s case, failed to procure evidence or failed to consider any relevant information. In addition, in deciding to discipline Complainant, Torres did not act in an unreasonable fashion. Complainant had, since December 1999, developed a pattern of poor performance whenever he was not being directly supervised. He also was unavailable on at least five separate occasions. Given the requirements of availability and ability to work independently for TM1 positions, Torres’ decision to discipline Complainant is not unreasonable.

As set forth above, state employees may be disciplined for failure to perform adequately. Board Rule R-6-9, 4 CCR 801. In light of Complainant’s continuing poor performance through two consecutive rating periods, Respondent did not act contrary to rule or law in disciplining Complainant.

### **C. The discipline imposed was within the range of reasonable alternatives**

Complainant was terminated from his employment with CDOT. Respondent argues that Complainant poses a continuing danger to the traveling public and other CDOT employees.

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Complainant argues that, in light of Complainant's work history, the basis for his poor performance (his divorce and the resulting financial and emotional difficulties) and the lack of direct supervision of him for a seventeen-month period, termination was too severe and is unwarranted under the circumstances. In deciding whether to impose discipline an appointing authority must take mitigating and aggravating factors, including a person's disciplinary history, into consideration. Board Rule R-6-6, 4 CCR 801.

Complainant's poor performance continued throughout at least an eighteen-month period, from November 2000 through April 2002. In balance, Complainant had a performance record of receiving "fully competent" or "good" ratings for eight consecutive performance rating periods. However, many of those ratings were well within the low range for "fully competent" or "good." In addition, during the eighteen-month period, Complainant received five corrective actions for either poor performance or unavailability. Despite those corrective actions, there was no credible evidence that Complainant's performance was improving. Indeed, Complainant himself, when asked by Torres during the R-6-10 meeting, was unable to propose any solutions to rectify his poor performance.

As argued by Respondent, Complainant's poor performance could have a severely adverse impact on both the traveling public and his co-workers. In the case of his operation of CDOT vehicles, Complainant has shown a lack of judgment in using the vehicles for other than their intended purpose. As a ten-year employee of CDOT, he should have been aware of the proper way to cut or take down trees along the roadway. Instead, he chose to experiment with unsafe methods, using CDOT vehicles for other than their intended purpose and, thereby, created road hazards which placed the traveling public at risk and endangered himself. In addition, by failing to put the wings up on the tractor mower, he caused a severe, and potentially fatal accident.

Complainant's lack of availability also imposes an additional burden on his co-workers who must pick up the slack when Complainant is unreachable. Availability is a requirement for the TM1 position. There was no evidence that Complainant was unaware of this requirement or that he had any difficulty in complying with this requirement prior to November 2000.

Complainant's proffered reason for his poor performance and his lack of availability, financial and emotional stress resulting from his divorce, are mitigating factors, as is his prior work history. However, given the danger Complainant poses to the traveling public and his co-workers when he is performing poorly and the burden imposed upon his co-workers when he is unavailable, they are not mitigating factors that outweigh the aggravating factors.

The lack of a permanently assigned work leader to Complainant's patrol is also a mitigating factor. But, in balance, many of Complainant's job duties must be performed independently. Therefore, the lack of a permanent work leader, should not have had as severe an impact as Complainant alleges. In addition, it is noted that Cary Mount was permanently assigned as a work leader for Complainant's patrol in January 2002. Despite having a permanently assigned work leader at that time, Complainant was unavailable on three separate occasions, twice used CDOT vehicles to perform tasks for which they were not designed and ignored Mount's instructions to



replace a set of blades on a mold board.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

**D. Attorney fees are not warranted in this action.**

Respondent has requested an award of attorney fees. Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees to Respondent is not warranted. Complainant presented rational arguments and competent evidence to support his claims. In addition, there was no evidence that would lead to the conclusion that Complainant pursued his constitutional right to a hearing in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth.

**CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

## ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this \_\_\_\_ day of November, 2002.

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Kristin F. Rozansky  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-894-2136

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

## **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

## **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

## **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

## **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of November, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Mark Schwane, Esq.  
Colorado Federation of Public Employees  
1580 Logan Street, Suite 310  
Denver, Colorado 80203

and in the interagency mail, to:

Danielle Moore  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods